Issue: Administrative Review of Hearing Officer's Decision in Case No. 10095; Ruling Date: October 9, 2013; Ruling No. 2013-3710; Agency: Department of Corrections: Outcome: Hearing Decision in Compliance.

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

Office of Employment Dispute Resolution

ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2014-3710
October 9, 2013

The grievant has requested that the Office of Employment Dispute Resolution ("EDR") administratively review the hearing officer's decision in Case Number 10095. For the reasons set forth below, EDR will not disturb the hearing officer's decision.

FACTS

The relevant facts in Case Number 10095, as found by the hearing officer, are as follows:[1]

> Grievant had been a correctional officer for fifteen (15) years. He had one active Group III disciplinary action on his record with the facility.
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> On March 17, 2013 Grievant was assigned to C-2 pod day shift duty as a floor officer. Another officer was assigned to C-3. There are three (3) pods in C building. C-1 had no officer assigned. The facility was short staffed on that day. Testimony was given that the facility was always short staffed on "Race weekends" that being the two (2) annual NASCAR races held in Bristol, Tennessee in March and August of each year. Grievant was not assigned to the C-1 pod on the day of the incident. However, it is not uncommon for officers to pair up in a pod during movement of offenders to and from cells.
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> On March 17, 2013 at approximately 9:25 a.m., Grievant and another officer were present in C-1 pod for the return of offenders to their respective cells at the end of an indoor recreation period. During this time three (3) offenders from C-1 pod entered cell number 117 which was not their assigned cell. The three (3) offenders, unauthorized to be in cell 117, had entered cell 117 for the purpose of causing physical harm to cellmate "A". Apparently, there was a gang controversy regarding A's use of the phone the gang members had designated as "their phone". The time between the end of the recreation period when the perpetrators entered the cell and the next time the cell doors were open was

[1] Decision of Hearing Officer, Case No. 10095 ("Hearing Decision"), August 30, 2013, at 2-3. Some references to exhibits presented at the hearing have been omitted here.

approximately one (1) hour. During this one (1) hour time A was repeatedly beaten while his intimidated cellmate watched. Records introduced as evidence show offender A was severely beaten.

Grievant was charged with gross negligence for not observing the three (3) unauthorized offenders enter A's cell at the close of the recreation period. Grievant stated he was focused on another offender who had not returned to his cell on time due to returning late from his shower. The rapid eye camera recording of the offenders returning to their cells was not very focused. From the vantage point of the camera, the door to cell number 117 was not observable. The camera did show Grievant and another officer present at all times during the offenders return to their cells.

There was no controversy to the fact that (5) five offenders were in cell 117 leaving three (3) other cells with only one (1) offender per cell. Clearly four cells namely 105, 106, 115 and 117 were not properly observed.

Upon a view by this Hearing Officer of the actual cell block from the cell floor where Grievant and another officer stood, the view to the door of cell 117 was clear. As stated earlier, the cell block rapid eye camera was placed high on the wall near the control tower and could not "see" the door to cell number 117 as it was obscured by the stairs. Grievant's view of cell 117 was not obscured at the time of the incident.

After the offenders were returned to their cells Grievant went on break and was gone most of the time that A was being beaten. When Grievant returned he stated he did a scheduled check of all cells at about 11:15 am. He stated he saw nothing out of the ordinary in any of the cells. He stated he observed A on the upper bunk with his face to the wall. Fifteen (15) minutes later at the next scheduled indoor recreation period, A's cellmate came to Grievant and advised that A needed attention. Grievant stated he found A curled up on the upper bunk. According to Grievant, A made a verbal response to him. Grievant was not permitted by facility rules to enter the offender's cell. Grievant, concluding A was injured, called for emergency medical assistance. When medical staff arrived, A was lying on the cell floor. Grievant stated he had no idea how A had gotten from the bunk bed to the floor. A was unresponsive and unconscious when examined by the medical staff. A was transported to a local facility and from there transferred to intensive care in another medical facility where his condition was considered serious.

In the hearing decision, the hearing officer assessed the evidence as to whether the grievant exhibited gross negligence on the job by permitting an inmate to be seriously injured,

finding in the affirmative, and upheld the agency's issuance of a Group III Written Notice of disciplinary action with termination.[2] The grievant now appeals the hearing decision to EDR.

DISCUSSION

By statute, EDR has been given the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and "[r]ender final decisions . . . on all matters related to procedural compliance with the grievance procedure."[3] If the hearing officer's exercise of authority is not in compliance with the grievance procedure, EDR does not award a decision in favor of either party; the sole remedy is that the hearing officer correct the noncompliance.[4]

Hearing Officer's Citation to the Record

The grievant's request for administrative review argues that nineteen factual findings in the hearing decision contain "no citations regarding where in the record the Hearing Officer has made her conclusions." The grievance procedure provides that a hearing officer's decisions "shall . . . contain findings of fact as to the material issues in the case" [5] and "the grounds in the record for those findings."[6] While the grievant is correct that the hearing officer did not explicitly state the record evidence on which she relied in making her findings of fact, we do not find that this is an error that warrants remanding the case to the hearing officer. It is a better practice for hearing officers to cite to or otherwise identify the evidence in the record that supports their findings of fact, but the failure to do so should not, in general, require the case to be remanded. Most importantly, we have reviewed nothing to suggest that the factual findings without citations are not supported by evidence in the record. We will not disturb the hearing officer's decision on this basis in the absence of a compelling reason that would call into question any of the nineteen factual findings identified by the grievant such that explanatory citations to the record might be required.

Hearing Officer's Consideration of the Evidence

The grievant further claims that the hearing officer "incorrectly characterized" certain factual findings and failed to provide the "reasoning for deciding those issues." Specifically, he claims that the hearing officer incorrectly determined that "[t]here was no controversy to the fact that (5) five offenders were in cell 117 leaving three (3) other cells with only one (1) offender per cell. Clearly four cells namely 105, 106, 115 and 117 were not properly observed."[7] The grievant argues that this issue was, in fact, "fiercely contested" throughout the hearing and that the hearing officer did not explain her reasoning for determining which inmates entered cell 117.

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[2] *Id*. at 5-6.
[3] Va. Code §§ 2.2-1202.1(2), (3), (5).
[4] *See Grievance Procedure Manual* § 6.4(3).
[5] Va. Code § 2.2-3005.1(C).
[6] *Grievance Procedure Manual* § 5.9.
[7] Hearing Decision at 2.

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[8] and to determine the grievance based "on the material issues and grounds in the record for those findings."[9] Further, in cases involving discipline, the hearing officer reviews the facts *de novo* to determine whether the cited actions constituted misconduct and whether there were mitigating circumstances to justify a reduction or removal of the disciplinary action, or aggravating circumstances to justify the disciplinary action.[10] Thus, in disciplinary actions the hearing officer has the authority to determine whether the agency has established by a preponderance of the evidence that the action taken was both warranted and appropriate under all the facts and circumstances.[11] Where the evidence conflicts or is subject to varying interpretations, hearing officers have the sole authority to weigh that evidence, determine the witnesses' credibility, and make findings of fact. As long as the hearing officer's findings are based upon evidence in the record and the material issues of the case, EDR cannot substitute its judgment for that of the hearing officer with respect to those findings.

In this case, there is sufficient evidence in the record to support the hearing officer's conclusion that three offenders, one each from cells 105, 106, and 115, entered cell 117 at approximately 9:25 a.m.[12] The person who formally investigated this incident testified at the hearing that, during her investigation, she identified three inmates from cells 105, 106, and 115 as the perpetrators.[13] Her investigative materials and communications with the agency about the incident are consistent with her conclusion.[14]

The grievant appears to be correct, however, that there was at least some conflicting evidence about the identity of the perpetrators. For example, an agency employee who conducted a preliminary investigation testified that attackers were housed in cells 106 and 115, not cell 105.[15] In addition, one of the perpetrators stated during an interview with an investigator that there were two, rather than three, attackers.[16] Weighing the evidence and rendering factual findings is squarely within the hearing officer's authority, and EDR has repeatedly held that it will not substitute its judgment for that of the hearing officer where the facts are in dispute and the record contains evidence that supports the version of facts adopted by the hearing officer.[17] Here, there are clearly facts in the record to support the hearing officer's finding that three offenders from cells 105, 106, and 115 carried out the assault. While it may be true that this issue was contested at the hearing, we do not find that the hearing officer's characterization of the facts as "uncontroverted" renders those factual findings deficient in any way. EDR cannot substitute its judgment for that of the hearing officer on this issue, and we decline to disturb the hearing decision on this basis.

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[8] Va. Code § 2.2-3005.1(C).
[9] *Grievance Procedure Manual* § 5.9.
[10] *Rules for Conducting Grievance Hearings* § VI(B).
[11] *Grievance Procedure Manual* § 5.8.
[12] Hearing Decision at 2.
[13] Hearing Recording, CD 1 at 2:42:59-2:43:25 (testimony of Investigator Q).
[14] *See* Agency Exhibits 11, 12.
[15] Hearing Recording, CD 1 at 1:48:20-1:48:38, CD 1 at 2:20:46-2:22:40 (testimony of Investigator M).
[16] *Id*. at CD 1, 3:29:35-3:29:55 (testimony of Investigator Q); *see* Agency Exhibit 11.
[17] *See, e.g.*, EDR Ruling No. 2012-3186.

With respect to the grievant's contention that the hearing officer must identify the reasoning for her factual determination about the identities of the attackers, we do not find that the lack of explanation, if any, is an error that warrants remanding this case to the hearing officer. The *Rules for Conducting Grievance Hearings* (the "*Rules*") state that, "[i]f a case is decided on issues of disputed facts, the hearing officer must identify and explain his/her reasoning in resolving the dispute(s)."[18] Here, the hearing officer essentially found that the agency's official investigation into the incident was correct in identifying inmates housed in cells 105, 106, and 115 as the attackers. She clearly did not find the evidence to the contrary persuasive. It was not unreasonable for the hearing officer to conclude that the findings of the official investigation were more persuasive than the preliminary investigation or the perpetrator who stated that only two inmates participated in the assault.

More importantly, the identity of the attackers was not a central issue in this case. The grievant's alleged gross negligence in failing to observe multiple offenders entering cell 117 and attacking the victim was the conduct for which he was disciplined. The hearing officer was tasked with evaluating whether the grievant engaged in that behavior, whether that behavior was misconduct, and whether the agency's disciplinary action was consistent with law and policy.[19] We have not reviewed, and the grievant has not presented, any evidence that suggests the hearing officer failed to do so. The question of who carried out the attack was not a dispositive issue in this case, and any failure by the hearing officer to explain her reasoning on this issue does not, therefore, justify remanding the case. Accordingly, we will not disturb the decision on this basis.

The grievant further asserts that the hearing officer's conclusion that the grievant should have observed the irregularities in the inmates' locations (i.e., that cell 117 had five inmates and cells 105, 106, and 115 had only one inmate each), but failed to do so "on [his] 11:15 am round"[20] is not based on evidence in the record because "[e]ach and every Agency witness testified that they believed any and all unauthorized inmates had exited [cell 117] by approximately 10:30 AM." The grievant appears to correctly claim that the hearing officer's statements about this issue may not be factually accurate. The hearing officer found that the attackers entered cell 117 at approximately 9:25 a.m.[21] The hearing decision further states that "[t]he time between the end of the recreation period when the perpetrators entered the cell and the next time the cell doors were open was approximately one (1) hour," during which time the victim was "repeatedly beaten."[22] At the hearing, no witness could pinpoint the particular time when the perpetrators left cell 117, or if they came out at all, but one witness did agree that the agency alleged they left the cell at approximately 10:30 a.m.[23] It seems that the hearing officer logically determined the perpetrators left cell 117 at approximately 10:25 a.m. Both the record and the hearing decision, therefore, appear to support the grievant's contention that there would have been no inconsistency in the inmates' locations for the grievant to observe during his 11:15 a.m. security check.

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[18] *Rules for Conducting Grievance Hearings*§ V(C).
[19] *See id*. at § VI(B)(1).
[20] Hearing Decision at 5.
[21] *Id* at 2.
[22] *Id*.
[23] Hearing Recording, CD 1 at 2:28:34-2:29:07 (testimony of Investigator M).

While we agree with the grievant that this portion of the hearing decision may not be supported by evidence in the record, we also note that the Group III Written Notice that was the subject of the hearing lists the charged conduct as the grievant's failure to find out why the three inmates entered cell 117 and his failure to "perform a security check after the Offenders returned and were secured in their cells."[24] The charged conduct does not include the grievant's failure to observe any issues, if there were any, when he made a security check at 11:15 a.m. As stated above, hearing officers may make "findings of fact as to the *material issues* in the case"[25] and to determine the grievance based "*on the material issues* and grounds in the record for those findings." [26] Based on the Written Notice, it is apparent that the 11:15 a.m. security check was not a material issue in this case because the grievant was not disciplined for his conduct at that time.

Furthermore, the hearing officer's mitigation analysis states that there are no mitigating factors "relevant to Grievant's actions between 9:25 am and 9:35 am on the morning of the incident."[27] Clearly, the hearing officer considered the grievant's behavior between 9:25 a.m. and 9:35 a.m. as essential in upholding the Written Notice, not his conduct during the 11:15 a.m. security check. This fact, in combination with the charged conduct listed in the Written Notice, leads us to conclude that a factual error as to what the grievant should or should not have observed at that time would not change the result in this case. Because remanding this case to the hearing officer for reconsideration on this issue would not affect the outcome, we decline to disturb the hearing decision on this basis.

Mitigation

The grievant further contends that the hearing officer's mitigation analysis was flawed because her decision to uphold that disciplinary action was based on "conduct that occurred after 9:35 AM" while she "only considered potential mitigating factors that occurred between 9:25 AM and 9:35 AM." By statute, hearing officers have the power and duty to "[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by [EDR]."[28] The *Rules* state "a hearing officer is not a 'super-personnel officer'" and that "in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy."[29] More specifically, the *Rules* provide that in disciplinary grievances, if the hearing officer finds that

> (i) the employee engaged in the behavior described in the Written Notice, (ii) the behavior constituted misconduct, and (iii) the agency's discipline was consistent with law and policy, the agency's discipline must be upheld and may not be mitigated,

[24] Agency Exhibit 13.
[25] Va. Code § 2.2-3005.1(C).
[26] *Grievance Procedure Manual* § 5.9.
[27] Hearing Decision at 6.
[28] Va. Code § 2.2-3005(C)(6).
[29] *Rules for Conducting Grievance Hearings* § VI(A) (citation omitted).

> unless, under the record evidence, the discipline exceeds the limits of reasonableness.[30]

Thus, the issue of mitigation is only reached by a hearing officer if he or she first makes the three findings listed above.

Importantly, because reasonable persons may disagree over whether or to what extent discipline should be mitigated, a hearing officer may not simply substitute his or her judgment on the issue for that of agency management. Indeed, the "exceeds the limits of reasonableness" standard is a difficult to meet, and has been described in analogous Merit Systems Protection Board case law as one prohibiting interference with management's discretion unless the facts show that the discipline imposed is unconscionably disproportionate, abusive, or totally unwarranted.[31] EDR will review a hearing officer's mitigation determination for abuse of discretion,[32] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard.

The hearing decision states that there are "no mitigating factors that would be relevant to Grievant's actions between 9:25 am and 9:35 am on the morning of the incident that would warrant reducing the disciplinary action."[33] Contrary to the grievant's assertion, it does not appear that the hearing officer considered only those mitigating factors that may have been present between 9:25 a.m. and 9:35 a.m., but merely determined that there were no mitigating factors to justify the grievant's conduct during that time. Indeed, the hearing officer explicitly stated that, "[i]n considering mitigation, there would have been more than one procedure to make observation of offenders movements more efficient" and that "[t]he facility should be fully staffed."[34] Clearly, she considered at least these two mitigating factors that do not relate to the grievant's actions between 9:25 a.m. and 9:35 a.m. on the date of the incident. EDR's review of the record does not indicate, and the grievant has not argued, that the hearing officer failed to consider any other mitigating factors that may have been presented. Likewise, the record does not show that the evidence was insufficient to support the hearing officer's mitigation determination or that the hearing officer's determination was otherwise arbitrary and capricious. Accordingly, EDR will not disturb the hearing decision on this basis.

CONCLUSION AND APPEAL RIGHTS

For the reasons stated above, EDR will not disturb the hearing decision in this case. Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing officer's original

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[30] *Id.* at § VI(B)(1) (citations omitted).
[31] The Merit Systems Protection Board's approach to mitigation, while not binding on EDR, can be persuasive and instructive, serving as a useful model for EDR hearing officers. *E.g.*, EDR Ruling No. 2012-3102; EDR Ruling No. 2012-3040; EDR Ruling No. 2011-2992 (and authorities cited therein).
[32] "'Abuse of discretion' is synonymous with a failure to exercise a sound, reasonable, and legal discretion." Black's Law Dictionary 10 (6th ed. 1990). "It does not imply intentional wrong or bad faith . . . but means the clearly erroneous conclusion and judgment—one [that is] clearly against logic and effect of [the] facts . . . or against the reasonable and probable deductions to be drawn from the facts . . . ." *Id.*
[33] Hearing Decision at 6.
[34] *Id*. at 5.

decision becomes a final hearing decision once all timely requests for administrative review have been decided.[35] Within 30 calendar days of a final hearing decision, either party may appeal the final decision to the circuit court in the jurisdiction in which the grievance arose.[36] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[37]

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[35] *Grievance Procedure Manual* § 7.2(d).
[36] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[37] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).